

*United States Court of Appeals
for the Second Circuit*



**APPELLEE'S REPLY
BRIEF**

76-6156

UNITED STATES COURT *of APPEALS*
FOR THE SECOND CIRCUIT

SAMUEL M. KAYNARD, REGIONAL DIRECTOR OF
REGION 29 OF THE NATIONAL LABOR RELATIONS
BOARD, FCR AN ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD

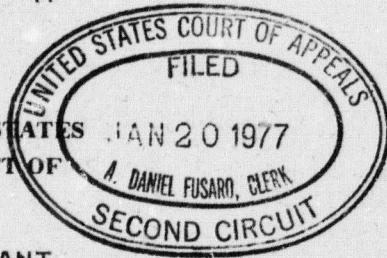
Petitioner-Appellant,

B

P/S

v.
JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY
AND PENSION COMMITTEE, JOINT INDUSTRY BOARD OF
THE ELECTRICAL INDUSTRY, AND TRUSTEES OF THE
PENSION HOSPITALIZATION AND BENEFIT PLAN OF THE
ELECTRICAL INDUSTRY, AS NAMED IN APPENDIX A,

Respondent-Appellee.



ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF
NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
HAROLD J. DATZ,
Associate General Counsel,

JOSEPH E. MAYER,
Assistant General Counsel,
MILFORD R. LIMESAND,
Deputy Assistant General Counsel,
NELSON A. LEVIN
Attorney.

National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

INDEX

Authorities Cited

Cases:

	<u>Page</u>
Johansen v. Queen Mary Restaurants, 86 LRRM 2813 (C.D. Cal., 1974), vacated as moot and remanded, 522 F. 2d 6 (C.A. 9, 1975)	5
N.L.R.B. v. American National Insurance Co., 343 U.S. 395 (1952)	2
N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421 (1967)	2
N.L.R.B. v. Preston Feed Corp., 309 F. 2d 346 (C.A. 4, 1962)	2
Seeler v. Trading Port, Inc., 88 LRRM 3293 (N.D. N.Y., 1974)	5
Seeler v. Trading Port, Inc., 517 F. 2d 33 (C.A. 2, 1975)	2,5,6
United States v. Cirami, 535 F. 2d 736 (C. A. 2, 1976)	4
United States v. Munsingwear, 340 U.S. 36 (1950)	5
<u>Statutes Involved:</u>	
Section 10(j)	1,2,3
<u>Miscellaneous:</u>	
N.L.R.B. Rules and Regulations and Statements of Procedure, Series 8, as amended, (29 C.F.R.) §102.94(a)	3
Rule 60(b) of the Federal Rules of Civil Procedure	4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL M. KAYNARD, Regional Director of
Region 29 of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

JOINT INDUSTRY BOARD OF THE ELECTRICAL
INDUSTRY AND PENSION COMMITTEE, JOINT
INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
AND TRUSTEES OF THE PENSION HOSPITALIZATION
AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY,
AS NAMED IN APPENDIX A,

Respondent-Appellee.

REPLY BRIEF FOR PETITIONER-APPELLANT

The Joint Board's principal argument is that an order directing it to reopen the dental clinic pending the Board's final determination of the unfair labor practice case is not "just and proper" under Section 10(j) of the Act. According to the Joint Board, the cost of operating the clinic would be \$1,000,000, and such an additional drain on the already depleted welfare fund would potentially bring financial ruin to the Joint Board and jeopardize the other benefits it provides. The Joint Board contends that this irreparable injury which it would likely suffer from a reopening order far outweighs any injury which the affected employees or the public interest will suffer in the absence of such interim relief. These contentions are

not only speculative but are also misleading and not properly germane to this proceeding.

1. While the Joint Board was at all times free to close any department or terminate any benefit provided under the pension and welfare plan so long as the decision was motivated solely by economic considerations, e.g., N.L.R.B. v. Preston Feed Corp., 309 F. 2d 346, 352 (C.A. 4, 1962), in the instant case the Regional Director found, and the district court agreed, that there was reasonable cause to believe that the Joint Board closed the dental clinic and discharged the employees to discourage the dentists' union activities and to avoid its bargaining obligations under the Act. We submit ^{1/} that cases involving such discriminatory discharges and unlawful refusals to bargain present particularly appropriate circumstances for the application of Section 10(j) remedial relief. For "enforcement of the obligation to bargain collectively is crucial to the statutory scheme," N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 402 (1952), and, "in the labor field, as in few others, time is crucially important in obtaining relief." N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421, 430 (1967). Hence, it is both appropriate and necessary for this Court to issue the requested interim order to "reestablish the conditions as they existed before the employer's unlawful campaign" and to preserve the efficacy of the Board's final order. Seeler v. Trading Port, Inc., 517 F. 2d 33, 38 (C.A. 2, 1975).

1/ While the Joint Board intimates throughout its brief that its decision to close the dental clinic was wholly economically motivated, neither party to this proceeding appealed from the district court's contrary conclusion, and it is inappropriate for the Joint Board now to rely on such asserted economic justifications. See our brief in main, p. 21, n. 15.

2. The Joint Board's suggestion that it would cost \$1,000,000 to reopen and operate the dental clinic pending the Board's decision is not only an inflated estimate unsupported by the record, ^{2/} but is also based on the unwarranted assumption that the Board will not render its final decision for a full calendar year. Such an occurrence is highly unlikely in view of the present posture of the unfair labor practice proceeding. The hearing before the Administrative Law Judge was completed in July 1976, and the parties' briefs have been filed. Hence, his decision and recommended order should be forthcoming in the near future. Once his decision is rendered, the Board's own Rules and Regulations, (29 C.F.R.) Section 102.94(a), require that it consider the matter expeditiously since injunctive relief under Section 10(j) has been procured. Accordingly, it may be fairly anticipated that considerably less than a full year will be required for the Board to render its decision in this case.

In short, any reasonable estimate of the cost of operating the clinic during the pendency of the Board's order falls far short of the \$1,000,000 figure submitted by the Joint Board. ^{3/}

- 2/ The record shows that for the fiscal year ending September 30, 1975 the total cost of operating the dental clinic was \$895,248, including total salaries, fringe benefits and payroll taxes of \$760,266 (A. 560). For the first six months of the most recent fiscal year (October 1, 1975 - March 31, 1976), the total expenses for the clinic were \$393,524 (A. 566). Projecting this over the full fiscal year, the actual operating expenses would have amounted to somewhat less than \$800,000. Of course, since the existing injunctive order requires the Joint Board to maintain the dental clinic's offices and equipment, no additional investment would be required to resume operations.
- 3/ Even the \$1,000,000 cost figure represents a relatively small portion of the \$13,900,000 total operating costs of the welfare fund for the fiscal year ending September 30, 1975 (A. 555).

3. Nor would the costs of restoring dental care to the beneficiaries of the welfare fund have a critical, much less a fatal, impact on the solvency of the fund, as the Joint Board asserts. Indeed, the record shows that the welfare fund had a surplus balance of \$14,274,613 as of March 31, 1976, just one month prior to the unlawful closing of the dental clinic (A. 566). While this represents a decline of \$2,411,673 from the September 30, 1975 fund balance (A. 555), it also reflects an increase of almost \$7,000,000 over the ^{4/} fund balance of September 30, 1970 (S.A. 1). Obviously, the expenses of operating the clinic pending the Board's decision would not impair the fund's ^{5/} continued viability.

Of course, if the continued operation of the dental clinic should become such a burden on the Joint Board that its existence were indeed threatened, as the Joint Board assertedly fears, the Joint Board would be free to move the court to modify the order to relieve it from such "extreme hardship" under Rule 60(b) of the Federal Rules of Civil Procedure. See generally, United States v. Cirami, 535 F. 2d 736 (C.A. 2, 1976).

Neither may this expenditure of the welfare plan funds be characterized as a dissipation of its assets in contravention of the principles under which it was established, as the Joint Board seems to suggest. Unlike a commercial venture created with a profit motive, the Joint Board was not founded and does

4/ "S.A." refers to the supplemental appendix appearing at the close of this brief.

5/ Indeed, it seems reasonable to conclude that the very purpose of maintaining a fund balance is to ensure the continuation of all benefits even when economic conditions result in the Joint Board's expenses exceeding its income.

not exist to earn profits or to maximize the return to its shareholders.

Instead, the Joint Board was

established for the purpose of protecting the employees included within the collective bargaining unit . . . and their wives and families in old age, disability, sickness, serious injury, and of conferring death and such other benefits as may mutually be agreed upon from time to time between Employers and the Union (S.A. 2).

The welfare fund's accumulated balance is derived principally from Employer contributions to underwrite the cost of the benefits provided by the fund (Joint Board's Br. 1, A. 264, 555). Thus, the expenditure of a portion of the fund's assets to resume dental care for its beneficiaries would provide the very sort of benefits for which the Joint Board was created and which it was providing until the advent of the dentists' organizational activities. It would be difficult to conceive of a more appropriate use of those assets.

4. Finally, the Joint Board's reliance on the district court's decisions in Johansen v. Queen Mary Restaurants, 86 LRRM 2813 (C.D. Cal., 1974) (Br. 29, 41) and Seeler v. Trading Port, Inc., 88 LRRM 3293 (N.D. N.Y., 1974) (Br. 28-29) is misplaced. While in both those cases the district courts denied the Board's petition for injunctive relief, including an interim reinstatement order, the Board appealed in both cases.

While the appeal was pending in Queen Mary, the Board issued its decision in the underlying unfair labor practice case. The Ninth Circuit then vacated the district court's decision and remanded the case with directions to dismiss the petition as moot. 522 F. 2d 6 (C.A. 9, 1975). The court thereby indicated that the district court's decision should not stand as precedent. See United States v. Munsingwear, 340 U.S. 36 (1950).

And in Trading Port, the employer reinstated the discharged employees in accordance with the Administrative Law Judge's recommended order, so the issue could not be submitted to this Court for consideration. 517 F. 2d 33, 35, n. 1 (C.A. 2, 1975). Of course, the district court's order denying an interim bargaining order was reversed and the case remanded for reconsideration in the light of this Court's decision.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, it is respectfully submitted that an order directing the Joint Board to reinstate the discharged employees, reopen the dental clinic, and recognize and bargain with the Union is just and proper interim relief, and that the case should be remanded to the district court with directions to enter such an order.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS,
Deputy General Counsel,

HAROLD J. DATZ,
Associate General Counsel,

JOSEPH E. MAYER,
Assistant General Counsel,

MILFORD R. LIMESAND,
Deputy Assistant General Counsel,

NELSON A. LEVIN,
Attorney.

National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

January, 1977.

PENSION, HOSPITALIZATION AND BENEFIT PLAN
OF THE ELECTRICAL INDUSTRY

STATEMENT OF CHANGES IN FUND BALANCES
FOR THE YEAR ENDED SEPTEMBER 30, 1971

	<u>Combined</u>	<u>Regular Account</u>	<u>Pension Trust Fund</u>	<u>Loan Fund</u>
Fund balances as at beginning of year - as previously reported	\$44,679,838	\$7,658,310	\$36,021,528	\$1,000,000
Adjustments - Note E	<u>164,806</u>	<u>21,583</u>	<u>143,223</u>	<u>-</u>
Fund balances as at beginning of year - as restated	<u>44,844,644</u>	<u>7,679,893</u>	<u>36,164,751</u>	<u>1,000,000</u>
 Additions:				
Contributions from contractors	13,500,597	8,105,158	5,395,439	
Investment income - Note B	<u>2,030,908</u>	<u>404,487</u>	<u>1,626,421</u>	
	<u>15,531,505</u>	<u>8,509,645</u>	<u>7,021,860</u>	
	<u>60,376,149</u>	<u>16,189,538</u>	<u>43,186,611</u>	<u>1,000,000</u>
 Deductions:				
Death and pension premium benefits	1,492,031	1,492,031		
Hospitalization benefits	1,895,020	1,895,020		
Surgery benefits	835,577	835,577		
Serious injury benefits	24,680	24,680		
Bayberryland expenses - rest home	136,559	136,559		
Dental department expenses	556,465	556,465		
Medical department expenses	513,719	513,719		
 Pensions paid to members:				
Standard	394,215		394,215	
Supplemental	2,755,643		2,755,643	
Disability	<u>86,340</u>		<u>86,340</u>	
	<u>8,690,249</u>	<u>5,454,051</u>	<u>3,236,198</u>	
 Administrative and recordkeeping expenses charged by the Joint Industry Board of the Electrical Industry	418,887	396,972	21,915	
Rent	5,929	5,929		
Stationery and supplies	6,003	6,003		
Professional fees	5,600	5,600		
Luncheons, meetings and conferences	9,970	9,970		
General expenses	<u>2,004</u>	<u>1,542</u>	<u>462</u>	
	<u>448,393</u>	<u>426,016</u>	<u>22,377</u>	
	<u>9,138,642</u>	<u>5,880,067</u>	<u>3,258,575</u>	
 Fund balances as at end of year - Exhibit A	<u>\$51,237,507</u>	<u>\$10,309,471</u>	<u>\$39,928,036</u>	<u>\$1,000,000</u>

The accompanying notes are an integral part of this statement.

Supplemental Appendix

SA. 1

TABLE OF CONTENTS

	Page
Pension Committee	1
Trustees	4
Contributing Employers	9
Participants	11
Pension Trust Fund.....	12
Committee Representatives	14
Benefits (A to L)	16
Standard Pension	17
Disability Pension	20
Major Medical Benefit.....	21
Hospitalization	25
Surgery	27
Serious Injury	28
Death and Pension Premium.....	29
Rest Home Benefit.....	29
Dental Department	30
Medical Department	30
Housing Benefit	31
Optical Benefit	32
General Rules	32
Amendment and Termination.....	35
Surgical Allowances	40
Information on All Industry Pensions.....	48
Procedure—Request for Benefits	55

PREAMBLE

The Pension, Hospitalization and Benefit Plan of the Electrical Industry created in 1941, and established for the purpose of protecting the employees included within the collective bargaining unit represented by Local Union No. 3 of the International Brotherhood of Electrical Workers, AFL-CIO under collective bargaining agreements with Employers, and their wives and families in old age, disability, sickness, serious injury, and of conferring death and such other benefits as may be mutually agreed upon from time to time between Employers and the Union to aid these employees and their families and better their every day living conditions, shall be administered by the Pension Committee of the Joint Industry Board as an integral part of the collective labor agreement for the electrical industry.

WITNESSETH:

WHEREAS, LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO (hereinafter called the "Union") and the NEW YORK ELECTRICAL CONTRACTORS ASSOCIATION, INC., the EMPIRE ELECTRICAL CONTRACTORS ASSOCIATION, INC., and the ASSOCIATION OF ELECTRICAL CONTRACTORS, INC., each an Employer's trade association representing Employers in the electrical contracting industry (hereinafter jointly called the "Employers" or "Employer") and all Contractors who are signa-

NO. 76-6156

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL M. KAYNARD, Regional Director of
Region 29 of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

JOINT INDUSTRY BOARD OF THE ELECTRICAL
INDUSTRY AND PENSION COMMITTEE, JOINT
INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
AND TRUSTEES OF THE PENSION HOSPITALIZATION
AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY,
AS NAMED IN APPENDIX A,

Respondent-Appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 18, 1977, two copies of the Reply Brief for Petitioner-Appellant in the above-captioned case were duly mailed in a government franked envelope to Irwin Geller, Esquire, Menagh, Trainor and Rothfeld, 130 East 40th Street, New York, New York 10016, Counsel for Respondent-Appellee.

Milford R. Limesand
Milford R. Limesand
Deputy Assistant General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 18th day of January, 1977.